Supreme Court, U.S.
FILED

No. 041473 MAY 3 - 2005

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In The

Supreme Court of the United States

ABDEL MOHAMAD RAHIM,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555

Counsel for Petitioner
Abdel Mohamad Rahim

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the state court decision that the erroneous admission of a non-testifying co-defendant's confession was harmless beyond a reasonable doubt involved an unreasonable application of clearly established Supreme Court precedent.

2. Whether a federal habeas court must defer to a state habeas court's credibility choices made without an evidentiary hearing instead of reviewing *de novo* whether the state court decision was based on an unreasonable determination of the facts in light of the evidence presented.

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PETITION FOR A WRIT OF CERTIORARI

Abdel Mohamad Rahim respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Court of Appeals of Texas is not reported (Appendix D). The order of the Texas Court of Criminal Appeals denying discretionary review is not reported (Appendix E). The order of the United States Supreme Court denying certiorari is reported at 528 U.S. 810 (Appendix F). The findings of facts and conclusions of law of the Criminal District Court Number Four of Dallas County in the state habeas proceeding are not reported (Appendix G). The order of the Texas Court of Criminal Appeals denying habeas corpus relief is not reported (Appendix H). The findings, conclusions and recommendation of the United States Magistrate Judge is not reported (Appendix B). The order of the United States District Judge adopting that recommendation is not reported (Appendix C). The opinion of the Fifth Circuit affirming the denial of relief is not reported (Appendix A).

JURISDICTION

The Fifth Circuit affirmed the denial of relief on February 23, 2005. This petition is filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

The Fifth Circuit erred in upholding the state court decision that the erroneous admission of a non-testifying co-defendant's confession was harmless beyond a reasonable doubt. Given the importance that the prosecutor attributed to the confession during summation, and the likelihood that a rational jury probably would not believe the testimony of the jail inmates on whom the State otherwise relied, the erroneous admission of the confession was not harmless beyond a reasonable doubt. Furthermore, it had a substantial and injurious effect or influence on the verdict.

The Fifth Circuit also erred in holding that the federal district court properly deferred to the state court decision that the State did not suppress favorable impeachment evidence or use perjured testimony. The state habeas court

made credibility choices based on a "paper record" without conducting an evidentiary hearing. The federal habeas court should have reviewed *de novo* whether the state court decision that the State did not offer consideration to the jail inmates in exchange for their testimony was based on an unreasonable determination of the facts in light of the evidence presented.

B. Procedural History

Petitioner pled not guilty to capital murder in Dallas County. The State did not seek the death penalty. The jury convicted him, and he received an automatic life sentence on June 28, 1996.

The Fifth Court of Appeals affirmed the conviction in an unpublished opinion issued on June 5, 1998, and denied rehearing on July 17, 1998 (Appendix D). The Texas Court of Criminal Appeals refused discretionary review on January 27, 1999 (Appendix E). The United States Supreme Court denied certiorari on October 4, 1999. *Rahim v. Texas*, 528 U.S. 810 (1999) (Appendix F).

Petitioner filed a state habeas corpus application on October 2, 2000. The state district court, without conducting an evidentiary hearing, entered findings of fact and conclusions of law on January 25, 2001 (Appendix G). The Texas Court of Criminal Appeals denied relief on May 2, 2001 (Appendix H).

Petitioner filed a federal habeas corpus petition on May 4, 2001. The magistrate judge, without ruling on petitioner's requests for discovery and an evidentiary hearing, recommended that relief be denied on February 10, 2004 (Appendix B). The district court adopted the

magistrate judge's recommendation and dismissed the petition on February 23, 2004 (Appendix C). The Fifth Circuit affirmed the denial of relief on February 23, 2005 (Appendix A).

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT ERRED IN HOLDING THAT THE STATE COURT DECISION THAT THE ERRONEOUS ADMISSION OF A NON-TESTIFYING CO-DEFENDANT'S CONFESSION WAS HARMLESS BEYOND A REASONABLE DOUBT DID NOT INVOLVE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT.

Mario Cabrera shot and killed Ahmad Hassan, the owner of Bob's Market, a grocery store in Dallas, Texas. The State contended that petitioner, the owner of Super Seven, another grocery store, solicited the murder. The State's case against petitioner was based primarily on the admission of a non-testifying co-defendant's written confession and the testimony of two jail inmates that petitioner confessed to them.

The trial court admitted the written confession of Adolfo Vivanco, a non-testifying co-defendant, over confrontation and hearsay objections (5 R.R. 550-66, 574). Vivanco told the police that the owner of the Super Seven had offered Mario Cabrera and him $500 each to kill the owner of Bob's Market; Cabrera committed the murder; and, on the following day, they went to the Super Seven,

where Cabrera collected the money (5 R.R. 577).[1] Petitioner owned the Super Seven (4 R.R. 405).

To corroborate Vivanco, the State presented the testimony of jail inmates Darrell Hardman and John DeJean that petitioner confessed to them. Hardman testified that petitioner initially solicited him to commit the murder and, thereafter, said that he paid some Mexicans $500 to do it (4 R.R. 473-74, 476-77). DeJean testified that petitioner confessed to him while they were in jail (5 R.R. 522-26). Both inmates, who had lengthy criminal histories and pending charges, denied that they had been offered or that they expected to receive consideration in exchange for their testimony (5 R.R. 479-82, 519,522,528-29).[2]

The prosecutor repeatedly emphasized the importance of Vivanco's confession during summation. Initially, defense counsel argued that Vivanco had accused petitioner, but " . . . we don't get to see him point the finger. We don't get to see him in the courtroom" (5 R.R. 695). The court sustained the prosecutor's objection and instructed the jury to disregard the argument that "Adolfo Vivanco is not here." The prosecutor then argued that Vivanco's

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[1] Petitioner offered in rebuttal Vivanco's testimony from a suppression hearing at his trial, in which he denied any knowledge of the murder and asserted that a detective wrote his confession, which he signed without reading (5 R.R. 631-32, 635-38).

[2] Orlando Barrios, a fellow gang member of Vivanco and Cabrera, provided the only other testimony that was detrimental to petitioner. Barrios testified that, after Cabrera was arrested for capital murder, petitioner had Barrios write on a piece of paper a scenario describing how Cabrera killed Hassan during an argument, and told Barrios to give it to Cabrera to use in an attempt to get his capital murder charge reduced (4 R.R. 408-13).

confession to the police was true; that it contained the words of a participant in the crime; and that Vivanco identified petitioner as the person who hired him (5 R.R. 713-14). The prosecutor pointed out that Vivanco told the police that they were paid the next day, and when Cabrera was arrested about a day and a half later, he had $401 on him (5 R.R. 716-17). Finally, the prosecutor stressed that even if the jury did not believe one or both of the jail inmates, the jury had "Vivanco's own words in State's Exhibit 2" (5 R.R. 719).

Petitioner contended on appeal that the admission of Vivanco's confession denied him the right to confrontation. The state court of appeals assumed that the confession was improperly admitted but held that any error was harmless beyond a reasonable doubt (Appendix D). The state court decision involved an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

The admission of a non-testifying co-defendant's confession that implicates the defendant violates his Sixth Amendment right to confront the witnesses against him. U.S. CONST. amend. VI; *Bruton v. United States*, 391 U.S. 123 (1968). This Court recently clarified that a testimonial statement of a person who does not testify at trial is admissible only where he is unavailable and the defendant had a prior opportunity to cross-examine him. *Crawford v. Washington*, 541 U.S. 36, 59 (2004). A suspect's statement made during police interrogation is testimonial. *Id.* at 52. Thus, the admission of Vivanco's confession violated the Confrontation Clause.

On direct appeal, the standard to determine harmless error arising from a federal constitutional violation is set forth in *Chapman v. California*, 386 U.S. 18 (1967), which

requires a new trial unless the error is harmless beyond a reasonable doubt. The state court of appeals unreasonably applied the *Chapman* standard in concluding that the erroneous admission of Vivanco's confession was harmless beyond a reasonable doubt because the jail inmates testified that petitioner confessed to them and the jury was aware that Vivanco has disavowed his confession at his trial (Appendix D). The Fifth Circuit, instead of analyzing whether the state court unreasonably applied *Chapman*, summarily concluded that the admission of Vivanco's confession did not have "a substantial and injurious effect or influence on the jury's verdict" (Appendix A).

This Court held in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), that, on collateral review, the standard to determine harmless error arising from a federal constitutional violation is set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946), which requires the petitioner to demonstrate that the error had a substantial and injurious effect or influence on the jury's verdict. The Fifth Circuit held in *Robertson v. Cain*, 324 F.3d 297 (5th Cir. 2003), that the *Brecht* standard applies on federal habeas review regardless of whether the state court recognized the constitutional error and held that it was harmless beyond a reasonable doubt. That approach is incorrect; under the AEDPA, the issue on federal habeas review is whether the state court unreasonably applied *Chapman*.

This Court has articulated the factors to consider in determining whether a Confrontation Clause violation is harmless beyond a reasonable doubt. In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), the Court explained:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Excluding Vivanco's confession, the State's case depended primarily on the testimony of Hardman and DeJean, jail inmates who contacted the authorities to offer testimony against petitioner in an attempt to extricate themselves from their own legal predicaments. No witness is less reliable than a jail inmate testifying that another inmate has confessed to a crime. Defense counsel did an admirable job of exposing their bias, interest, and motive for testifying against petitioner. However, counsel was unable to cross-examine Vivanco, who did not testify. The jury likely gave great weight to Vivanco's confession because he, unlike the jail inmates, was involved in the murder. Given the importance that the prosecutor attributed to the confession during summation and the likelihood that a rational jury ordinarily would not believe jail inmates like Hardman and DeJean, the erroneous admission of Vivanco's confession was not harmless beyond a reasonable doubt. Furthermore, it unquestionably had a substantial and injurious effect or influence on the verdict.

The magistrate judge concluded that the state appellate court did not unreasonably apply *Chapman* or *Brecht* in holding that the erroneous admission of Vivanco's confession was harmless (Federal Habeas Tr. 65-67;

Appendix B).[3] However, neither the state appellate court nor the magistrate judge acknowledged that, other than Vivanco's confession, only Hardman and DeJean (whose credibility was inherently suspect) implicated petitioner in the murder. Importantly, the State obviously believed that Vivanco's confession was necessary to obtain a conviction; otherwise, it would not have risked reversal by offering it.

The magistrate judge further concluded that, because petitioner "failed to establish that the trial testimony of either Hardman or DeJean was false or was in consideration for promises made by the State, the Fifth Court of Appeals was justified in considering their testimony in the context of its harmless error analysis" (Federal Habeas Tr. 67; Appendix B). The habeas record is to the contrary. Hardman testified by affidavit, "My testimony against Rahim was false. He did not ask me to kill Hassan or whether I knew anyone who would. He never told me he had paid anyone to kill Hassan. The investigators did tell me that I would do less time on the parole violation if I testified against Rahim . . . . I am making this affidavit because I feel bad that I lied against Rahim in a effort to help myself" (State Habeas Tr. 35-36). DeJean testified by affidavit that the prosecutor told him that the State would "take care of" him after he testified against petitioner, which he interpreted to mean that he would receive assistance on his pending habitual offender forgery cases (State Habeas Tr. 40-41). His attorney, Phil Wetherbee, provided an affidavit confirming this understanding (State Habeas Tr. 42).

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[3] The district court adopted the magistrate judge's findings and conclusions (Appendix B). The Fifth Circuit summarily affirmed that decision (Appendix A).

Finally, the magistrate judge concluded that the error was harmless because defense counsel introduced Vivanco's testimony from the suppression hearing at his trial in which he recanted his confession (Federal Habeas Tr. 66; Appendix B). This type of impeachment was not an effective substitute for cross-examination because the lawyers at the respective trials had different goals. Vivanco's lawyer was trying to persuade the court to suppress the confession because the police violated Vivanco's rights; he was not challenging Vivanco's credibility. Petitioner's lawyer, if given the opportunity to cross-examine, would have tried to demonstrate that Vivanco was not credible in implicating petitioner in the murder.

The state court decision that the erroneous admission of Vivanco's confession was harmless beyond a reasonable doubt involved an unreasonable application of Supreme Court precedent. The Fifth Circuit erred in summarily affirming that decision without analysis. This Court should grant certiorari. SUP. CT. R. 10(a) and (c).

II. THE FIFTH CIRCUIT ERRED IN HOLDING THAT A FEDERAL HABEAS COURT MUST DEFER TO A STATE HABEAS COURT'S CREDIBILITY CHOICES MADE WITHOUT AN EVIDENTIARY HEARING INSTEAD OF REVIEWING *DE NOVO* WHETHER THE STATE COURT DECISION WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED.

The trial court granted petitioner's motion to require the State to reveal all agreements with prosecution witnesses that could conceivably influence their testimony

(State Trial Tr. 85-87). The State denied the existence of any such agreements. John DeJean and Darrell Hardman denied at trial that they had been offered or that they expected to receive consideration in exchange for their testimony. However, they testified by affidavit in the state habeas proceeding that they had informal agreements or "understandings" with the State that they would receive consideration in exchange for their testimony and, after petitioner's trial, that they did receive consideration.

DeJean testified that petitioner confessed to him in jail (5 R.R. 524-26). He admitted that he had two pending habitual offender forgery charges but denied that he had been offered or that he expected to receive consideration in exchange for his testimony (5 R.R. 519, 529).

DeJean had been convicted of three felony thefts, two forgeries, mail fraud, and misdemeanor theft by check; two habitual offender forgery charges had been pending since 1993 (5 R.R. 518-20, 522).[4] He testified against petitioner in June 1996. The State dismissed the enhancement paragraphs, and he accepted a plea bargain for 10-year concurrent sentences on the forgery charges in September 1996.

DeJean testified by affidavit in the state habeas proceeding that, while he was in jail awaiting trial on the forgery charges, he contacted David Clark of the Dallas Police Department Intelligence Division and disclosed that he had information about petitioner's case. Clark arranged for DeJean to meet with the prosecutor, Tom D'Amore.

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[4] DeJean's criminal record was introduced in the state habeas proceeding (State Habeas Tr. 115-200). He was on parole on a 20-year sentence for theft when he was arrested for forgery.

Although D'Amore did not promise anything for his assistance, D'Amore told him that the State would "take care of" him after he testified against petitioner (State Habeas Tr. 40-41). The clear inference was that he would receive leniency on his pending forgery charges.

Phil Wetherbee, an assistant public defender who represented DeJean, testified by affidavit that the State offered DeJean 25 years on the forgery charges in December 1995. DeJean contacted the prosecution about petitioner in May 1996, and he testified against petitioner in June 1996. The State dismissed the enhancement paragraphs, and DeJean accepted a plea bargain for 10 years on the forgery charges in September 1996. Wetherbee's affidavit concluded:

> The State reduced the offer from 25 years to 10 years in consideration for DeJean's testimony against Rahim. Although the State did not promise any particular benefit before he testified, it was understood that he would receive leniency in exchange for his testimony.

(State Habeas Tr. 42).

The State had an understanding with both DeJean and Wetherbee that DeJean would receive leniency on the two habitual offender forgery charges in exchange for his testimony against petitioner. The State knowingly elicited DeJean's false testimony to the contrary and, after petitioner's trial, gave him the consideration that he denied to the jury he would receive.

Hardman testified that petitioner initially solicited him to commit the murder; thereafter, petitioner said that he had hired others to commit it and bragged, while in jail, that he would "beat the case" (4 R.R. 473-78). Hardman

admitted that he was in jail on a parole violation but denied that he had been offered or that he expected to receive consideration in exchange for his testimony (4 R.R. 479-82).

Hardman's criminal record was much more extensive than he represented to the jury. He testified that he had several convictions for burglary and theft (4 R.R. 479-80). In fact, at the time of petitioner's trial, he had been convicted of nine felonies and four misdemeanors and had been to prison four times.[5] When he contacted the State and offered to testify against petitioner, he was in jail on a parole violation.

Hardman testified by affidavit in the state habeas proceeding that the prosecution offered to help him serve less time on the parole violation if he would help convict petitioner. The officers who interviewed Hardman "suggested" facts that would help the State's case and made it clear that he would serve more time if he did not cooperate. He then gave a statement implicating petitioner (State Habeas Tr. 35-36).

Hardman was released from prison in May 1998. He was charged with possession of cocaine, enhanced by prior convictions, in August 1998. He accepted a plea bargain for a one-year sentence in December 1998. He was charged with delivery of cocaine, as an habitual offender, in March 1999. Despite his extensive criminal record, the State dismissed the enhancement paragraphs and reduced the charge; he accepted a plea bargain for ten years probation

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[5] Hardman's criminal record was introduced in the state habeas proceeding (State Habeas Tr. 45-114).

and was placed in a drug treatment center in July 1999. Hardman's affidavit concluded: (State Habeas Tr. 35-36)

> My testimony against Rahim was false. He did not ask me to kill Hassan or whether I knew anyone who would. He never told me that he had paid anyone to kill Hassan. The investigators did tell me that I would do less time on the parole violation if I testified against Rahim.
>
> After I testified, the State did not help me do less time on the parole violation. I was not released from prison until May 1998. However, the State gave me consideration for my testimony against Rahim in connection with two criminal charges filed after my release from prison. The State agreed to a one year sentence in December 1998. The State agreed to 10 years probation in July 1999, and I was placed in a drug treatment center.
>
> I am making this affidavit because I feel bad that I lied against Rahim in an effort to help myself.

The State offered consideration to Hardman in exchange for his testimony and knowingly elicited his false denial of same. After petitioner's trial, the State did not help him serve less time on the parole violation but, when he was charged with other offenses, afforded him leniency as a result of his testimony against petitioner. There is no other rational explanation for how a career criminal received probation on his eleventh felony conviction after four previous trips to prison.

Petitioner contended in the state habeas proceeding that the State suppressed evidence that DeJean and Hardman would receive consideration in exchange for their testimony and used their perjured testimony denying

any expectation of consideration. The state habeas court denied discovery and an evidentiary hearing; it gave credence to the affidavits of the trial prosecutor and his investigator denying any such agreements instead of the affidavits of the DeJean, his lawyer, and Hardman. (State Habeas Tr. 229-30). It made these credibility choices based on a "paper record" without requiring the State to disclose any internal file documents relevant to the suppression of evidence and perjury claims. *See Brady v. Maryland*, 373 U.S. 83 (1993); *Giglio v. United States*, 405 U.S. 150 (1972).[6]

The state habeas court had no factual basis to conclude that it was "abundantly clear at the time of trial that there was no deal between the prosecutor and the inmate witnesses" (State Habeas Tr. 229). If it was "abundantly clear" simply because the inmates testified at trial that there were no agreements, following this logic it should be just as clear now that there were agreements, as the inmates testified in the state habeas proceeding. More importantly, the court ignored the affidavit of assistant public defender Wetherbee that there was an understanding that DeJean would receive consideration in exchange for his testimony against petitioner. Although Wetherbee's affidavit seemingly should "break the tie" between the prosecutor and the inmates, the court gave it no credit.[7]

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[6] This Court has recognized the importance of post-conviction discovery in a federal habeas proceeding. *See Banks v. Dretke*, 540 U.S. 668, 684-85 (2004).

[7] The magistrate judge discounted Wetherbee's affidavit because he did not precisely articulate when DeJean was promised leniency (Federal Habeas Tr. 65; Appendix B). Wetherbee stated in his affidavit, "Although the State did not promise any particular benefit before he testified, it was understood that he would receive leniency in exchange

(Continued on following page)

The state habeas court observed that there was "no evidence that this prosecutor was involved in the final prosecution of DeJean," yet it denied petitioner's motion to produce "all documents, including internal file memos and work product, with regard to any consideration that was extended to Darrell Hardman [and] John DeJean . . . in exchange for . . . testimony" (State Habeas Tr. 229, 231).[8] The court penalized petitioner for failing to produce evidence that he could obtain only by court order or testimony at an evidentiary hearing. The federal habeas court likewise refused to order discovery or conduct an evidentiary hearing.

Finally, the state habeas court observed that it was "aware of many deals of this type in plea bargain situations" (State Habeas Tr. 229). The court's finding that the "dismissal of enhancement paragraphs in exchange for significant jail time is common and does not support [petitioner's] assertion that [DeJean] was promised this deal prior to his testimony" ignores Wetherbee's affidavit to the contrary. The State offered DeJean 25 years on habitual offender forgery charges in December 1995. DeJean contacted the prosecution in May 1996 and testified against petitioner in June 1996. The State dismissed the enhancement paragraphs, and DeJean accepted a plea bargain for 10 years in September 1996. Wetherbee's assertion that there was an understanding that DeJean

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for his testimony" (State Habeas Tr. 42). Thus, Wetherbee made clear that the agreement was made before DeJean testified against petitioner. Any ambiguity regarding this matter underscores the need for an evidentiary hearing.

[8] That D'Amore was not the prosecutor in DeJean's case was irrelevant; whether D'Amore or his agent communicated a request for leniency to that prosecutor was relevant.

would receive consideration in exchange for his testimony is corroborated by the sequence of events. Accordingly, the state court decision was based on an unreasonable determination of the facts in light of the evidence presented.

The magistrate judge observed that the state habeas court believed the trial testimony of Hardman and DeJean and the post-conviction affidavits of D'Amore and his investigator instead of the post-conviction affidavits of Hardman, DeJean, and Wetherbee (Federal Habeas Tr. 64; Appendix B). Had the state habeas court made these credibility choices following an evidentiary hearing at which petitioner had the opportunity to cross-examine D'Amore and obtain discovery of any relevant documents, the findings properly would be presumed to be correct in a federal habeas proceeding. However, these credibility choices should not be accorded a presumption of correctness where they were based on a "paper record."

The circuits disagree as to whether a federal habeas court must accord the presumption of correctness to state court findings of fact where the state court did not conduct a full and fair hearing. The Fifth Circuit held in petitioner's case that a federal habeas court may properly do so pursuant to *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001), *reh'g en banc denied*, 288 F.3d 702 (5th Cir. 2002), *cert. denied*, 537 U.S. 883 (2002) (Appendix A).[9] Other circuits have held that a federal habeas court need not defer to state court findings made without an evidentiary hearing. *See Drake v. Portuondo*, 321 F.3d 338 (2nd Cir.

[9] Even if *Valdez* was correctly decided, petitioner's case is distinguishable, as Valdez had evidentiary hearings in state and federal court, while petitioner had no hearing.

2003); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003), *cert. denied*, 125 S.Ct. 808 (2004); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), *cert. denied*, 541 U.S. 975 (2004).

The state habeas court could not accurately decide whether the State offered consideration to DeJean and Hardman in exchange for their testimony without conducting a hearing to assess the credibility of the witnesses. This Court should grant certiorari to resolve the circuit split as to whether a federal habeas court must defer to a state habeas court's credibility choices made without an evidentiary hearing instead of reviewing *de novo* whether the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

RANDOLPH L. SCHAFFER, JR.
Counsel of Record
THE SCHAFFER FIRM
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
(713) 951-9854 (facsimile)
noguilt@swbell.net (e-mail)

Counsel for Petitioner
Abdel Mohamad Rahim

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10331
Summary Calendar

ABDEL MOHAMAD RAHIM,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:01-CV-817-R

(Filed February 23, 2005)

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Abdel Mohamad Rahim appeals the district court's denial of his 28 U.S.C. § 2254 petition challenging his 1996 conviction for capital murder. Rahim contends that the district court erred when it denied him an evidentiary hearing and presumed the state habeas

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

judge's factual findings to be correct. Rahim has not shown that the district court erred in applying the presumption of correctness. *See Valdez v. Cockrell,* 274 F.3d 941, 949-51 (5th Cir. 2001). As the district court properly applied a presumption of correctness to the state habeas judge's factual findings, Rahim has failed to show that the district court abused its discretion in denying an evidentiary hearing. *Murphy v. Johnson,* 205 F.3d 809, 815 (5th Cir. 2000); *McDonald v. Johnson,* 139 F.3d 1056, 1059-60 (5th Cir. 1998).

Rahim also contends that the state habeas judge's factual findings were an unreasonable determination of the facts in light of the evidence presented. Rahim has failed to show that the district court erred in concluding that the state habeas judge's factual findings based on his credibility determinations were reasonable in light of the evidence presented.

Last, Rahim argues that the state appellate court's determination that the admission of a non-testifying co-defendant's confession was harmless error was an unreasonable application of clearly established Supreme Court precedent. Rahim has failed to show that the district court erred in concluding that the state appellate court's analysis of the evidence and application of the Supreme Court's harmless error standard was objectively reasonable. *Chapman v. California,* 386 U.S. 18, 24 (1967). Moreover, the admission of the confession did not have a substantial and injurious effect or influence on the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993). The judgment of the district court is, in all respects,

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABDEL MOHAMED RAHIM, Petitioner	§	
v.	§	
DOUG DRETKE, Director Texas Department of Criminal Justice, Correctional Institutions Division,[1] Respondent	§	CIVIL ACTION NO. 3:01-CV-0817-R

FINDINGS, CONCLUSIONS AND
RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

(Filed Feb. 10, 2004)

Pursuant to the provisions of 28 U.S.C. § 636(b) and the District Court's order filed on November 25, 2003 reassigning the petition, the subject cause has been referred to the undersigned United States Magistrate Judge. The findings, conclusions, and recommendations of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

[1] The "Institutional Division" of the Texas Department of Criminal Justice was renamed the "Correction Institutions Division." Additionally, the previous named respondent in this action was Janie Cockrell. On August 18, 2003 Doug Dretke succeeded Cockrell as Director of the Correctional Institutions Division. Under FED. R. CIV. P. 25(d)(1), he is "automatically substituted as a party."

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a state inmate pursuant to 28 U.S.C. § 2254.

Parties: Petitioner Abdel Mohamed Rahim ("Rahim" or "Petitioner") is confined by the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID). Respondent is the Director of TDCJ-CID.

Statement of the Case: Rahim entered a plea of not guilty to the offense of capital murder alleged in the indictment returned in cause number F9572756-LIK. The jury found Petitioner guilty and a term of life imprisonment was automatically imposed.

Rahim effected a direct appeal and on June 5, 1998 the Court of Appeals affirmed his conviction. *Rahim v. State*, No. 05-96-01069-CR, 1998 WL 289793 (Tex.App.-Dallas, 1998, pet. ref'd) (not selected for publication). Petitioner's petition for discretionary review was refused by the Texas Court of Criminal Appeals on January 27, 1999. *Rahim v. State*, PDR No. 98-1725. Rahim's petition for a writ of *certiorari* was denied by the United States Supreme Court on October 4, 1999. *Rahim v. Texas*, 528 U.S. 810, 120 S.Ct. 42 (1999). Thereafter he filed an application for habeas corpus relief pursuant to TEX. CODE CRIM. PROC. art. 11.07. *Ex. Parte Rahim*, Appl. No. 48, 544-01. The Texas Court of Criminal Appeals denied Rahim's application without written order on the findings of the trial court on May 2, 2001. *See Ex Parte Rahim* at cover.

In response to Rahim's petition and this court's show cause order Respondent filed an answer together with copies of Petitioner's prior state proceedings on October 25, 2001. Petitioner filed a traverse on October 30, 2001.

Findings and Conclusions: Rahim presents two grounds for relief in his § 2254 petition. The magistrate judge will address them in reverse order – the order in which they were presented in his art. 11.07 application.

Rahim claims that Darrell Daniel Hardman and John Felix DeJean testified falsely in the course of his criminal trial that neither had been offered any favors or consideration by the prosecution in exchange for the testimony presented to the jury on June 26th and 27th, 1996, respectively. It is well-settled that non-disclosure of promises made to a witness in consideration for the witness's testimony and the prosecution's failure to correct a witness's testimony that no consideration was given violates a defendant's due process rights. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972).

In support of this ground, first raised in his art. 11.07 application, Petitioner submitted the affidavits of Hardman, DeJean, and Phil Wetherbee. *See* Appl. No. 48, 544-01 at 0035; 40-42.[2] In response to the habeas application the State submitted affidavits executed by the prosecutor in Rahim's case, Tom D'Amore, *Id.* at 0212-14, and Barry Dyson, the District Attorney's investigator in the Rahim case who interviewed Darrell Hardman and John DeJean prior to Rahim's criminal trial. *Id.* at 0215-16.

The state habeas court, who was also the presiding judge at Petitioner's criminal trial, made findings of fact on this issue based upon the record and the contradicting affidavits, Finding of Fact Number 1, *Id.* at 0227-30, concluding that "The court finds that the inmate witnesses

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[2] Rahim also included affidavits executed by a private investigator, Samuel Williams. *Id.* at 0037-38 and 0043.

testified truthfully at trial that there was no deal in exchange for their testimony. The court finds that the State did not present perjured testimony." The Texas Court of Criminal Appeals in turn denied the application on the basis of the trial court's findings. *Id.* at cover.

Rahim's § 2254 petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). In pertinent part a federal court may not grant relief under § 2254 "unless the adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." § 2254(d)(2). Further the findings of the state court are entitled to a presumption of correctness, and may be overturned only in the event that they are rebutted by "clear and convincing evidence." § 2254(e)(1); *See, e.g. Burgess v. Dretke*, 350 F.3d 461, 466 (5th Cir. 2003).

The magistrate judge has carefully reviewed the trial testimony of Darrell Hardman (*See* No. F95-72756, Court Reporter's Vol. 3 at 453-66 (outside the jury's presence) and at 467-501 (in the jury's presence)), the trial testimony of John DeJean (*Id.*, Court Reporter's Vol. 4 at 516-21 (outside the jury's presence))[3] and 522-30 (in the jury's presence), and the contradicting affidavits filed in art. 11.07 proceeding. It is clear beyond question that, given the trial court's prerogative to assess the credibility of the evidence,[4] that the court's determination of the facts was reasonable, thereby foreclosing relief on this ground.

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[3] The transcript erroneously states that the jury was present. *See Id.* at 521.

[4] Petitioner argues that the state habeas court erred in failing to give credence to the affidavit of Mr. Wetherbee (*See* Pet. at 16-17).

(Continued on following page)

In his other ground for relief Rahim asserts that the Texas courts erred in finding that the admission of a non-testifying co-defendant's statement was harmless error. The last written analysis and reasoned decision of the Texas state courts on this issue is found in the opinion of the Fifth Court of Appeals in the context of Petitioner's direct appeal. *See* Appl. No. 48, 544-01 at 0021-24, [No. 05-96-01069-CR, opinion filed on June 5, 1998]. In addressing this issue the appellate court cited the prior decision of the Texas Court of Criminal Appeals in *Harris v. State*, 790 S.W.2d 568, 587-88 (Tex.Crim.App. 1989) in which that court recognized the application of the harmless error rule announced in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). In addition the opinion cited *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726 (1969) in which the Supreme Court applied the *Chapman* test to a *Bruton* violation.[5]

In *Chapman v. California*, *supra*, the Court in substance reiterated the test announced in *Fahy v. State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229 (1963) that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24, 875 S.Ct. at 828.

However, the trial court found that: "The dismissal of the enhancement paragraphs in exchange for significant jail time is common and *does not support* Appellant's contention *that [De Jean] was promised* this deal *prior to his testimony* at the Rahim trial." Appl. No. 48, 544-01, *supra*, at 229-30 (emphasis added). Wetherbee's affidavit is wholly silent as to any offers by the prosecution with respect to DeJean's testimony prior to the date of his testimony on June 27, 1996.

[5] *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968).

The differing results in the Supreme Court decisions addressing *Bruton* violations suggest that whether the error is harmless or not is a fact intensive inquiry on a case by case basis. *See Parker v. Randolph*, 442 U.S. 62, 71 n.5, 99 S.Ct. 2132, 2138 n.5 (1979). The Supreme Court has not addressed a fact scenario such as that presented in Rahim's case, where although a co-defendant's statement was admitted, the defense was permitted to present the co-defendant's prior inconsistent statement to police as well as the co-defendant's testimony at his separate trial wherein he recanted the statement admitted in the prosecution's case-in-chief.

More recently, in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993) the Court applied the harmless-error standard adopted in *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253 (1946) instead of the *Chapman v. California* test in the context of a § 2254 petition.

"Under *Brecht,* a constitutional trial error is not so harmful as to entitle a defendant to habeas relief unless there is more than a mere reasonable possibility that it contributed to the verdict. It must have had a substantial effect or influence in determining the verdict . . . if [the judges'] minds are in virtual equipoise as to the harmlessness, under the *Brecht* standard of the error, then we must conclude that it was harmful. Moreover, the *Brecht* standard does not require in order for the error to be held harmful that there be a reasonable probability that absent the error the result would have been different." *Corwin v. Johnson*, 150 F.3d 467, 500 (5th Cir. 1998); *but see Mitchell v. Espanza*, ___ U.S. ___, 124 S.Ct. 7, 11-12 (2004) (applying the *Chapman* test).

Before habeas corpus relief may be granted on this ground it must be demonstrated that the Texas court's determination that the admission of the co-defendant's statement was harmless error constituted "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). As is made clear in the Supreme Court's decision in *Price v. Vincent,* 538 U.S. 634, 123 S.Ct. 1848 (2003) and more recently in *Mitchell v. Espanza, supra,* a federal habeas court is not free to review the questions of law decided by a state court *de novo,* but is limited to deciding whether the state court applied Supreme Court precedent in an objectively unreasonable manner.

It cannot be said that the Fifth Court of Appeal's analysis of the evidence[6] and its application of the Supreme Court's harmless error standard under either *Chapman* or *Brecht-Kotteakos* was objectively unreasonable. Therefore relief on Rahim's *Bruton* claim is foreclosed.

RECOMMENDATION:

For the foregoing reasons it is recommended that Rahim's § 2254 petition be denied and dismissed.

A copy of this recommendation shall be transmitted to the counsel for Petitioner and to counsel for Respondent.

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[6] Because Petitioner has failed to establish that the trial testimony of either Hardman or DeJean was false or was in consideration for promises made by the State, the Fifth Court of Appeals was justified in considering their testimony in the context of its harmless error analysis.

SIGNED this 10th day of February, 2004.

/s/ Wm. F. Sanderson Jr.
Wm. F. Sanderson Jr.
United States
Magistrate Judge

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglass v. United Serv. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten (10) day period may bar a *de novo* determination by the district judge of any finding of fact and conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ABDEL MOHAMED RAHIM	)	**3-01-CV-817-R**
	)	
v.	)	
	)	
DOUGLAS DRETKE, Director,	)	
Texas Department of Criminal	)	
Justice Criminal Institutions	)	
Division	)	

ORDER

(Filed Feb. 23, 2004)

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED this 23 day of Feb., 2004.

/s/ Jerry Buchmeyer
UNITED STATES
DISTRICT JUDGE

AFFIRM and Opinion Filed June 5, 1998

[SEAL]

In The

Court of Appeals

Fifth District of Texas at Dallas.

No. 05-96-01069-CR

ABDEL MOHAMED RAHIM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F95-72756-LIK

OPINION

Before Justices Lagarde, Kinkeade, and Chapman
Opinion By Justice Chapman

Appellant appeals his jury conviction for capital murder. The trial court assessed a mandatory life sentence. In eight points of error, appellant generally contends the trial court erred in: (1) admitting the confession of his codefendant, (2) denying his requested accomplice witness charge, (3) admitting evidence of an out-of-court identification, (4) charging the jury in the disjunctive, and (5) overruling his motion for new trial. We affirm.

FACTUAL BACKGROUND

On December 5, 1994, Adolfo Vivanco and Mario Cabrera shot and killed Ahmad Hassan. The murder occurred outside a grocery store owned by the deceased called Bob's Market. Vivanco and Cabrera had lured the deceased out of the store and shot him in the parking lot. At trial, the State introduced evidence that the killing was a murder for hire and, specifically, that appellant paid Vivanco and Cabrera to kill the deceased.

David Alferez testified that he was at Bob's Market on the day of the murder. Just before the murder, Cabrera was talking on a public phone outside of the store. Alferez overheard Cabrera say, "We're getting paid to do this. We've got to kill the owner."

Orlando Barrios testified that he had known appellant for several years. Appellant owned a store called Super Seven. Barrios also knew Vivanco and Cabrera who were in the "Junior Home Boys" gang. After Cabrera was arrested for the murder, appellant spoke with Barrios about how to make the murder look like a regular killing instead of capital murder. Appellant told Barrios to write a story to give Cabrera about how the murder occurred. Appellant said that Cabrera needed to say he killed the deceased over an argument about a pair of socks. Additionally, appellant told Barrios that Vivanco had "snitched."

Darrell Hardman testified that he contacted police because he had information concerning the murder. Hardman was in jail at the time, but was not offered anything for cooperating with the police. Hardman stated that prior to the murder, appellant told him he wanted the owner of Bob's Market killed and offered Hardman money

to do it. Appellant wanted the victim killed because he had "messed him out" of some money. Hardman knew that Vivanco and Cabrera often hung around appellant's store. In June 1995, appellant told Hardman that he had paid some Mexican guys $500 to kill the owner of Bob's Market.

Hardman saw appellant in jail after appellant's arrest. Appellant said the [sic] had "beat the mother fuckers again – they did not have any evidence on him." Hardman admitted having several prior convictions for burglary and theft, but had no pending cases at the time of trial.

John de Jean testified that in January 1996, while in jail, he met appellant. He spoke to appellant at various times about various subjects. In the spring of 1996, they talked about the murder at Bob's Market. Appellant told de Jean that Cabrera and Vivanco were involved in the murder and asked de Jean if he could find out if they were in the county jail. Appellant said he wanted to know because they were supposed to testify at his murder trial. A few day later, appellant told de Jean that he paid Vivanco and Cabrera $500 each to kill the owner of Bob's Market. Appellant laughed about it and said he was not worried because there were no witnesses when he paid them. Shortly thereafter, de Jean contacted the police to tell them about appellant's statements.

De Jean admitted having several prior convictions for felony theft, forgery, and mail fraud. He further admitted having a pending felony forgery charge. Neither the prosecutor or the police had promised him anything for his testimony, and he expected nothing in return for his testimony.

The State offered the written statement of Adolfo Vivanco through the testimony of Detective Kenneth Penrod. Penrod stated that he arrested Vivanco in March 1995. On March 12, 1995, Vivanco made a statement to police. The statement was admitted over appellant's hearsay and confrontation clause objections. The statement is as follows:

> A few days before we killed the owner of Bob's Market, I don't remember how many days, me and Mario Cabrera went to the Super Seven Store and talked to one of the owners. I don't know the owner's name. He told us he would pay us $500.00 each to kill the owner of Bob's Market. He didn't tell us why he wanted it done. We said we would do it. He told us he would pay us after we did it. A few days later me and Mario walked up to the store. I had the gun in a paper sack and he grabbed it from my hand. It was a five-shot revolver. When we got to the store we stopped out front by the phones. I talked to my girlfriend. We waited, but the owner did not come out. Mario decided to go in and tell the owner that someone was vandalizing his van. That's when I started walking toward the alley. I heard five shots. I turned around and saw Mario running toward me. We saw Chino at the store in his white car when we were walking to the store. We told him to wait for us over on Madison, but we went straight to my apartment. Me and Mario went up to the Super Seven on Colorado the next day to get our money. Mario told me to wait outside. Mario went in and got the money. He came out and gave me my $500.00 and kept his $500.00. It was in 20's. I tried to find out the owner's name who paid us because Navarro asked me to. They just told me not to worry

about it because all Mario would get was five years.

Penrod further testified that he showed Vivanco a photographic line-up to see if he could identify the person that offered him money to kill the deceased. Vivanco identified appellant.

Introduction of Vivanco's Out-of-Court Statement and Identification

In points of error, one, two, four, five, and six, appellant contends the trial court erred in overruling his objection to Vivanco's confession and permitting Penrod to testify that Vivanco identified appellant as the person that offered him money to kill the owner of Bob's Market. He complains generally that the admission of Vivanco's statements violated the confrontation clause and was inadmissible hearsay.

Assuming, without deciding, admission of the statement and identification was error, we conclude the error was harmless. Because appellant's complaints concern constitutional error, we must reverse unless we can say beyond a reasonable doubt that the error did not contribute to the conviction or the punishment assessed. Tex. R. App. P. 44.2(a); *Harrington v. California*, 395 U.S. 250, 254 (1969). We must isolate the error and all its effects, then ask whether a rational trier of fact might have reached a different result if the error and its effects had not occurred. *See Harris v. State*, 790 S.W.2d 568, 588 (Tex. Crim. App. 1989). In making this determination, we consider: (1) the source of the error; (2) the nature of the error; (3) whether or to what extent it was emphasized by the State; (4) the probable collateral implications of the

error; and (5) whether declaring the error harmless would encourage the State to repeat it with impunity. *Id.* at 587. We do not focus on the propriety of the outcome of the trial, but on the integrity of the process that led to conviction and punishment. *Id.* Overwhelming evidence of guilt, while not determinative, is a factor that can be considered. *See Denton v. State*, 920 S.W.2d 311, 312-13 (Tex. Crim. App. 1996).

We conclude, reviewing the record as a whole, admission of Vivanco's out-of-court statements was harmless beyond a reasonable doubt. David Alferez, who was present at Bob's Market at the time of the shooting, overheard Cabrera saying that he was getting paid to kill the owner of Bob's Market. Appellant told Orlando Barrios that he was devising a story for Cabrera to tell police so that it would not appear as though it was a murder for hire. Moreover, appellant told Barrios that Vivanco had "snitched." Thus, there was other evidence that Vivanco had confessed and implicated appellant. Furthermore, appellant told Darrell Hardman that he had paid "some Mexicans" to kill the owner of Bob's Market. Appellant also told John de Jean that he paid Vivanco and Cabrera $500 each to kill the owner of Bob's Market.

Although appellant was not permitted to cross-examine Vivanco as to the substance of the statement, appellant was able to introduce a prior inconsistent statement made by Vivanco to police. Specifically, appellant offered a statement in which Vivanco claimed he was not involved in the shooting. Furthermore, appellant was permitted to read Vivanco's testimony from Vivanco's own trial into evidence where Vivanco effectively recanted his confession. Vivanco testified that after he was arrested, Penrod questioned him about the murder. Vivanco told

Penrod that he had already told police everything he knew in his prior statement. Vivanco claimed that Penrod told him he wanted Vivanco to finger appellant and, if he did, Vivanco could get out of jail. Vivanco was exhausted when he signed the confession, which Penrod wrote, and cannot remember signing the confession or whether Penrod read the confession to him. He only signed the statement so that Penrod would leave him alone. Appellant was thus able to present the jury with evidence to impeach Vivanco even though Vivanco did not testify at appellant's trial and was not subject to cross-examination.

We recognize that the State did somewhat emphasize Vivanco's confession in closing. However, it emphasized the confession only in so far as it corroborated the testimony of Navarro, Barrios, and de Jean. We conclude the record as a whole establishes that admission of Vivanco's statement and identification was harmless beyond a reasonable doubt. We overrule appellant's first, second, fourth, fifth, and sixth points of error.

ACCOMPLICE WITNESS CHARGE

In his third point of error, appellant contends the trial court erred in denying his requested accomplice witness charge. Appellant asserts that Vivanco's confession constituted testimony of an accomplice witness and, therefore, that the trial court was required to give the jury a charge on accomplice witness testimony. *See* TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979). In *Bingham v. State*, 913 S.W.2d 208, 213 (Tex. Crim. App. 1995) (op. on reh'g), the court of criminal appeals held that no accomplice witness charge is necessary when the statement of a nontestifying accomplice is introduced into evidence. *See*

id. Therefore, the trial court did not err in refusing appellant's requested charge. We overrule appellant's third point of error.

DISJUNCTIVE CHARGE

In his seventh point of error, appellant contends the trial court erred in charging the jury in the disjunctive that it could convict if it found that the deceased employed "Mario Cabrera, Tony Ramos or Adolfo Vivanco" to kill the deceased. He complains that because the indictment charged in the conjunctive, the State was required to prove that appellant employed all three men to kill the deceased. We disagree. It is well established that the indictment can allege in the conjunctive and the jury can be charged in the disjunctive. *See White v. State*, 890 S.W.2d 69, 72 (Tex. Crim. App. 1994); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991), *cert. denied*, 504 U.S. 958 (1992). We perceive no error. We overrule appellant's seventh point of error.

DISMISSAL OF INDICTMENT

In his eighth point of error, appellant contends the trial court erred in overruling his motion for new trial. Prior to trial, appellant filed a motion to dismiss the indictment claiming that the State had violated his sixth amendment right to counsel because the State used appellant's private investigator to investigate a collateral solicitation to commit capital murder case against appellant. The trial court held a hearing on the motion to dismiss. However, because a key witness could not appear, the trial court continued the hearing until after trial, treating the motion as a motion in arrest of judgment. In a

post-trial hearing, the trial court heard additional evidence on the issue presented in the motion to dismiss the indictment. The evidence presented is as follows.

David Wells testified that he was employed by appellant's attorney to work as an investigator in the instant capital murder case. While working on the case, appellant told Wells that he wanted Michael Aziz killed and offered Wells money if he would do the job. Wells contacted a friend, Gregory Baker, an FBI special agent, to ask his advice as to what he should do.

Baker told Wells that he should wear a wire the next time he spoke to appellant and attempt to get evidence on the solicitation charge. Wells agreed to do so and taped several conversations between appellant and himself concerning the solicitation case.

Baker told Wells that he did not want to hear anything about the instant case and that it had no relevance to the solicitation case. Consequently, Wells did not discuss the instant case with Baker. Wells, however, acknowledged that on the tapes, there was some discussion of the instant case. These tapes were ultimately obtained by the district attorney's office after the FBI decided that the solicitation case should be filed in State court. Although Wells spoke with an assistant district attorney about the solicitation case, the assistant district attorney did not want to know anything about the instant case. Wells testified that the prosecutor never asked him about witnesses, defensive theories, or anything else about this case. Wells was formally removed as appellant's investigator after appellant's arrest for solicitation and appellant's attorney learned of Wells's actions.

Gregory Baker testified confirming Wells's testimony. Baker said that after Wells approached him about the solicitation offense, they decided to obtain evidence against appellant by wiring Wells.

Baker was aware that Wells was working for appellant's attorney and he, therefore, had some concerns about Wells's conflict. Consequently, Baker asked an Assistant U.S. Attorney whether Wells's investigation of the solicitation offense would violate appellant's sixth amendment rights. The Assistant U.S. Attorney told Baker there would not be a problem as long as he was not attempting to get information in the pending case.

Baker made clear to Wells he was not interested in the instant capital murder case and they never discussed this case. Baker instructed Wells that if appellant spoke of the instant case while he was wired to attempt to change the subject.

Baker met with the assistant district attorney to tell him generally of the situation. Baker did not initially give the district attorney any details about the solicitation offense. Eventually, however, Baker gave the tapes to the district attorney's office through the Dallas Police Department because the FBI decided the solicitation case should be filed in State court.

The prosecutor in the instant case testified that he learned that there was an FBI investigation concerning appellant about three weeks before appellant was arrested for the solicitation offense. At that time, FBI special agent Baker told the prosecutor that he was investigating a case against appellant, but Baker did not tell the prosecutor what the offense was or who he was working with in the investigation. After appellant was arrested, the prosecutor

learned that appellant was arrested for solicitation to commit capital murder and that David Wells was helping the FBI.

Appellant asserts that Wells was acting as a government agent and that his actions in taping his conversations and working with the FBI violated his right to counsel and due process. He further asserts that he is entitled to dismissal of the indictment because the tapes were turned over to the district attorney's office and the tapes disclosed the strategy of his defense and aided the prosecution in its presentation of its case against him.

Assuming that the State's actions show a violation of appellant's constitutional rights, we nevertheless conclude appellant has not established that he is entitled to the relief requested, dismissal of the indictment with prejudice.

A trial court, by dismissing an indictment with prejudice, is in effect instructing the prosecutor not to proceed with future charges arising from the same offense. *Gaitan v. State*, 905 S.W.2d 703, 705 (Tex. App. – Houston [14th Dist.] 1995, pet. ref'd). A trial court may not dismiss an indictment with prejudice without the prosecutor's consent except in certain circumstances where the court is authorized by constitution, statute, or common law. *State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991). One such circumstance, authorized by the sixth amendment to the United States Constitution, is prosecutorial misconduct which prejudicially violates a defendant's right to counsel, where the exclusion of improperly obtained evidence will not cure the prejudice. *State v. Frye*, 897 S.W.2d 324, 330 (Tex. Crim. App. 1995); *Gaitan*, 905 S.W.2d at 705. Under *Frye*, the trial court must first

determine whether appellant's sixth amendment right to counsel was violated and then determine whether dismissal of the indictment with prejudice is warranted. *Frye*, 897 S.W.2d 327-30.

Dismissal of an indictment with prejudice is an extraordinary and drastic remedy. *Gaitan*, 905 S.W.2d at 705. The remedy is warranted only if a defendant suffers demonstrable prejudice or a substantial threat thereof, and where the trial court is unable to identify and neutralize the taint of the transgression by other means. *Fry*, 897 S.W.2d at 330; *Gaitan*, 905 S.W.2d at 705. Whether such prejudice is shown is a question of fact left to the trial court's discretion. *See Frye*, 897 S.W.2d at 331.

We have reviewed the record and conclude the trial court could have found appellant failed to demonstrate prejudice. Thus, the trial court did not err in refusing to dismiss the indictment.

We begin by noting that Wells was an agent of the federal government, not the State. Neither the district attorney nor any other State agency was involved in Wells's discussions with appellant concerning the solicitation case. Thus, we perceive no prosecutorial misconduct. The district attorney did, however, come into possession of the tapes which Wells made under the direction of the FBI.

We have reviewed a transcription of the tapes. Although the tapes contain various references to the instant case, the tapes focus almost exclusively on the solicitation case. Indeed, whenever appellant attempted to speak of the instant case, Wells tried to get him off that subject. The references that are on the tapes are vague and cryptic. The trial court was within its discretion in concluding

appellant's defense in the instant case was not prejudiced by Wells's investigation of a collateral crime. We conclude the trial court did not err in refusing to dismiss the indictment. We overrule appellant's eighth point of error and affirm the trial court's judgment.

/s/ Ron Chapman
RON CHAPMAN
JUSTICE

Do Not Publish
TEX. R. APP. P. 47
961069.U05

Order issued July 17, 1998

[SEAL]

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-96-01069-CR

ABDEL MOHAMED RAHIM, Appellant

V.

THE STATE OF TEXAS, Appellee

ORDER

Before Justices Lagarde, Kindeade and Chapman

We **DENY** appellant's motion for rehearing.

/s/ Ron Chapman
RON CHAPMAN
JUSTICE

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308,
CAPITAL STATION AUSTIN, TEXAS 78711

January 27, 1999 [STAMP]
COA#: 05-96-01069-CR
RE: Case No. 1422-98
STYLE: RAHIM, ABDEL MOHAMAD

[SEAL]

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

EDGAR A. MASON
2612 BOLL STREET
DALLAS TX 75204

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 4, 1999

Mr. Edgar Adams Mason
2612 Boll Street
Dallas, TX 75204-9050

Re: Abdel Mohammed Rahim
v. Texas
No. 98-1725

Dear Mr. Mason:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

WRIT NO. W95-72756-K(A)

EX PARTE	§	IN THE CRIMINAL
	§	DISTRICT
	§	COURT NO. 4
ABDEL MOHAMAD RAHIM	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the allegations contained in Applicant's Application for Writ of Habeas Corpus in the above styled and numbered cause, the Court makes the following Findings of Fact and Conclusions of Law:

HISTORY OF THE CASE

Applicant was convicted by the jury on a plea of not guilty of the offense of capital murder. The court assessed punishment at life confinement in the Texas Department of Criminal Justice, Institutional Division on June 28, 1996. Applicant's conviction was affirmed by the Court of Appeals in opinion no. 05-96-01069-CR on June 5, 1998.

Applicant was represented at trial and on appeal by the Honorable Ed Mason. Applicant is represented in this application for writ of habeas corpus by the Honorable Randy Schaffer.

QUESTIONS RAISED IN APPLICATION

Applicant alleges in this Application for Writ of Habeas Corpus that he is entitled to relief for the following reasons:

1. The State's suppression of evidence that consideration would be extended to two prosecution witnesses in exchange for their testimony, and the use of their perjured testimony, denied Applicant due process of law and a fair trial.

2. The admission of the confession of a non-testifying co-defendant denied Applicant confrontation and resulted in an unfair trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Applicant was charged with the offense of capital murder. It was alleged that Applicant paid two individuals to murder Ahmad Hassan. At trial the State presented the testimony of two inmates who came in contact with the Applicant while in the Dallas County Jail. The first witness, Darrell Hardman, testified that Applicant had previously approached him about killing the victim by Hardman did not accept the offer. Hardman also testified that while in jail with the applicant Rahim, he, Rahim, told Hardman that there was no evidence against him and that he believed he would be free from jail soon. John DeJean, the other inmate witness, testified at trial that he became friendly with Rahim in jail and that Rahim asked for information on the two inmates who did the killing and admitted to paying for the murder. Both of these witnesses testified that they were not given any preferable treatment in exchange for their testimony. Applicant now claims that there was a deal with the State in exchange for their testimony therefore the testimony to the contrary was false. Applicant claims that the State knowingly presented the perjured testimony of the inmate witnesses

in court and the perjured testimony denied Applicant a fair trial.

At trial both of these witnesses swore that there was no deal with the State that they would receive favorable treatment in exchange for their testimony. In fact, Hardman correctly testified at trial that he was being held on a parole warrant and that there was nothing that the Dallas County District Attorney's Office could do to help him. (R. 482) (See attached copy of Hardman's testimony.) DeJean also testified that he had not made a deal with the State for favorable treatment in exchange for his testimony, (R. 529) (See attached copy of DeJean's testimony.)

Applicant has presented to the court sworn affidavits from both of these witnesses that claim they had a deal with the State in exchange for their testimony. These affidavits strongly contradict their sworn testimony at trial. Hardman now claims that the State promised to help him at the parole revocation hearing. He also claims that he was given lenient treatment when he was later arrested on additional crimes committed long after this trial. DeJean now claims that his case pending at the time of trial was resolved when the enhancement paragraphs were dismissed. The question before the court is which testimony was true, the "no deal" testimony at trial or the "there was a deal" affidavits.

In response to these allegations the State has included affidavits from the prosecutor, Tom D'Amore and an investigator, Barry Dyson. Both of these men indicate that no deal was made with these witnesses in exchange for their testimony. Both of the inmate witnesses contacted the authorities, the testimony was not initiated by the police or the prosecution.

The court specifically remembers this trial. It was abundantly clear at the time of trial that there was no deal between the prosecutor and the inmate witnesses. The court finds that the testimony at trial was correct, there was no deal made between the prosecution and the witnesses. The court finds that the testimony of the inmate witnesses at the time of trial is the credible testimony. The sworn affidavits of the inmate witnesses are not believable. The court finds the affidavits of Tom D'Amore and Barry to Dyson to be true and correct. There was clearly no deal made between, the State and the inmate witnesses that favorable treatment would be given in exchange for testimony.

In Hardman's case, there was no deal that could have been made prior to trial. Hardman was held in jail on a parole warrant. The State was not involved in the revocation process and could not make a deal with him. To believe Hardman's assertion that the "favorable" treatment he received in his later crimes would require this court to believe that the State gave him a free pass for future criminal activity. That scenario is simply not credible. Applicant would also like the court to believe that the treatment of DeJean, the dismissal of enhancement paragraphs in exchange for his guilty plea, was also evidence of a prior deal. The prosecutor in this case denied the existence of a deal. There is no evidence that this prosecutor was involved in the final prosecution of DeJean. The court is aware of many deals of this type in plea bargain situations. The dismissal of enhancement paragraphs in exchange for significant jail time is common and does not support Applicant's assertion that he was promised this deal prior to his testimony at the Rahim trial.

In reviewing these allegations the court has been guided by the case law of *Duggan v. State*, 778 S.W.2d 465 (Tex. Crim. App. 1989). In that case it was determined that a deal did exist between witnesses and the prosecutor. The witnesses denied the deal at the time of trial and the prosecutor did not correct the false testimony. At a hearing on the motion for new trial the prosecutor admitted that he had promised some type of consideration in the pending cases in exchange for their testimony. In this case the court is unable to find any credible evidence that the prosecution made a deal with the witnesses prior to trial. The court finds that the inmate witnesses testified truthfully at trial that there was no deal in exchange for their testimony. The court finds that the State did not present perjured testimony. The Applicant was not denied due process or a fair trial. This allegation is without merit.

2. In his second allegation Applicant claims that the admission of the confession of a non-testifying co-defendant denied him confrontation and resulted in an unfair trial. Applicant acknowledges that this allegation was raised and rejected on direct appeal but claims that the issue should be re-examined in light of the first allegation. As the court has found that first allegation to be without merit, there are no grounds for habeas review of this issue. See, *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). This allegation is without merit.

3. Applicant has not been denied any rights guaranteed him by the Constitution of the United States or the Constitution of Texas.

4. Applicant is lawfully restrained and confined by Respondent.

5. Applicant's Application for Writ of Habeas Corpus is without merit and the Court recommends that the same be denied.

6. A hearing on this Application for Writ of Habeas Corpus is not necessary. Applicant's motion for an evidentiary hearing is denied. The motions for the production of evidence are also denied as it is clear in the affidavits of the prosecution that no deals were made. To allow such sweeping discovery of the prosecution files is uncalled and unnecessary in this case.

ORDERS OF THE COURT

In implementing the Court's Findings of Fact and Conclusions of Law, the Clerk will:

1. Prepare a transcript of papers in this cause and transmit the Court's Order and the Findings of Fact and Conclusions of Law, including the judgment and indictment, all plea papers, if any, and the Court of Appeals opinion, if any, to the Court of Criminal Appeals as provided by the Tex. Code Grim. Proc. Ann. Art. 11.07.

2. Send a copy of this Order and the Findings of Fact and Conclusions of Law to the Applicant and his counsel, if any, by depositing same in the U.S. Mail.

SIGNED AND ENTERED this 25 day of January 2001.

/s/ John Creuzot
Judge John Creuzot
Criminal District Court No. 4
Dallas County, Texas

[LOGO] WELCOME TO THE
TEXAS JUDICIARY ONLINE*

Case # WR-48,544-01

Event Information:

Event Type:	ACTION TAKEN
Description:	Application for Writ of Habeas Corpus – 11.07
Date:	5/2/2001
Disposition:	HC denied W/O written order on TC Fndgs-w/o Hear

Opinion Written:

* Available at http://www.cca.courts.state.tx.us/opinions/Event.asp?EventID=1877146